Supreme Court, U.S.
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No: _____

In the
Supreme Court of the United States
October Term, 1998

–

Roger Lee Heath
Petitioner,

v.

Baxter, Walters, Berger, and
Parties Listed in Pages iii – vi Attached.
Respondents

--

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

--

PETITION FOR A WRIT OF CERTIORARI

--

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100pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court improperly denied Petitioner notice of, and an opportunity to respond to, the allegations of fraud before imposing the sanctions of dismissal with prejudice in violation of the Fifth Amendment Due Process Clause in conflict with relevant Supreme Court and other Appellate Court decisions.

2. Whether filing of an accurate financial accounting number in an application for Forma Pauperis may be construed by the Court as fraud and then used to dismiss a case when other serious potential civil and criminal violations previously identified by the Court remain uncontested, including,

> "fraud by Plaintiff's former lawyers, conversion of patents by Plaintiff's former patent attorney, patent infringement, contributory infringement, unfair competition, defamation, blackmail, sexual harassment, extortion, misrepresentation, legal malpractice, collusion, payoffs, and that William Barrows and Hopkins & Sutter failed to rectify Plaintiff's demise."

and, in the face of additional new evidence of further potential violations by Defendants having been presented, is, in fact, a violation of the Court's obligations under Rule 61 of the Federal Rules of Civil Procedure.

3. Whether Patent Rights and Issues have precedence over all other issues within a patent infringement case so that an inventor's rights under Article 1 Section 8 of the Constitution may not be compromised.

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COMPOSED PRIMARILY OF VERY LARGE COMPETITOR CORPORATIONS , SOME OF WHICH HAVE ALREADY PLED GUILTY TO PAYOFFS, CONSPIRACY, AND RICO VIOLATIONS, OR INTERFERENCE CONCERNING OTHER'S PATENTS OR COMPETITIVE BUSINESSES IN OTHER CASES. PETITIONER IS PRO SE AND AN INDIVIDUAL ATTEMPTING TO OBTAIN REMEDIES. FOR SIMILAR SERIOUS CRIMES. WHICH THE COURTS FAILED TO ADDRESS VIOLATING F.R.C.P. RULE NUMBER 61.

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OPINIONS BELOW

On March 18, 1997 the District Court of the Northern District of Illinois dismissed the Case

In an order dated August 3, 1998 the Seventh Circuit Court of Appeals affirmed the District Court's order denying Plaintiff's Appeal. This order is unpublished and appears in the Appendix.

JURISDICTION

In an order dated August 3, 1998 the Seventh Circuit Court of Appeals affirmed the District Court's order. Jurisdiction of this Court is proper under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment:

> No person shall be . . . deprived of life, liberty, Or property, without due process of the law . . .

F.R.C.P. Rule 61

> The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Article 1 Section 8:

> To promote the progress of science and useful arts, by securing for limited times to authors, and inventors, the exclusive right to their respective writings and discoveries . . .

STATEMENT OF FACTS

Petitioner, Roger Lee Heath, has invented extremely valuable life saving technology. In 1983, Prudential Bache Securities, a nationally recognized securities firm, valued Petitioner's technology "conservatively" at $66.5 million dollars. Petitioner's inventions have been credited as saving thousands of lives worldwide and Petitioner has been nominated for the nation's highest prize awarded inventors, The Lemelson MIT Prize, by the Chairman of the American Heart Association, AED Committee, Dr. Richard Kerber, and other prominent medical experts . The American Heart Association has launched a national campaign to make use of

Petitioner's inventions as common as fire-extinguishers and fax machines beginning with first responders. This has increased the value of Petitioner's inventions substantially and will continue to do so in coming years.

Present estimated sales infringing Petitioner's patents, including some popular surgical applications, are estimated to be greater than $688,000,000.

This Case focuses primarily on three competitors (defendants) of Petitioner;

(1) Baxter International
(herein referred to as 'Baxter')
(2) Medical Research Labs
(herein referred to as 'MRL')
(3) Zenex Corporation
(herein referred to as 'Zenkich or Zenex')

;and those who have aided, in one way or another, each or all these competitors in anticompetitive activities including the criminal demise of the Petitioner and the company he founded, R2 Corporation. (the successor which is defendant, R2 Medical Systems, Inc. who is referred to herein as 'R2') The events surrounding the Defendants and the Petitioner are highly detailed in a Sworn Statement and Chronology assembled originally for attorney Eugene Friedman appointed by the District Court.

As the Court will see in disclosures, the Petitioner's former patent counsel and defendant, Gomer W. Walters, and his law associates or friends, each play key roles in the

systematic, prolonged, and pervasive deception of both Petitioner and the investors in the company he founded, R2, chiefly on behalf of the above competitors or their associates.

The events outline at least three parallel Conspiracies against the Petitioner, each representing actions on behalf of an above mentioned competitor:

(1) - On Behalf of Zenex - In very short summary, in this conspiracy Petitioner was referred by Zenex's own attorneys, defendant Dalton and others, to Gomer Walters. Walters then filed a lawsuit for Petitioner against Zenex, only to then intentionally loose it. Afterwards Gomer Walters converted Petitioner's patent rights to both himself and Zenex and then joined in practice with Zenex's own attorneys as rewards or payoffs.

(2) - On Behalf of Baxter - In very short summary, this conspiracy involves, in Gomer Walter's own words, a conspiracy or 'pathway to follow' given to him by Baxter Chairman, defendant William Graham. It should also be noted that Gomer Walters is a former Yale football teammate of defendant Vernon Loucks, Jr, CEO of Baxter, and that these facts were never presented to Petitioner as potential conflicts. In executing this conspiracy, Baxter and Loucks close associates (defendants Phildius, Kenyon, Scott, and Townsen (or Ventana Growth Fund)), and Graham's own former secretary, defendant Diana Hillier (placed into Petitioner's company by Gomer Walters himself.) participate in blackmail of Petitioner for sexual harassment, using a blackmail letter drafted, at least in part, by defendant,

Nadeen Berger. This is after Petitioner refused to sell his company to defendant NDM which later became Baxter/NDM and who supplies Baxter. After the blackmail of Petitioner, Baxter/NDM then infringed Petitioner's patents and proceeded to award defendant Gomer Walters, through its associates, a payoff or royalties potentially worth over $2,500,000. representing conversion and further infringement of the Petitioner's patent rights.

(3) - On Behalf of MRL - In very short summary, this conspiracy involves certain investors and advisors of defendant/competitor MRL; Dr. Gary Anderson, Ray Kraftson, and Safeguard Scientifics, who joined the Baxter associates mentioned above in demise of Petitioner. This is after these MRL associates, along with other investors, learned of a new defibrillator/resuscitator design that might obsolete MRL products.Then MRL was rewarded or paid off by acquiring distribution of Petitioner's technology and an illegally acquired agreement to pursue the highly secret defibrillator/resuscitator project infringing Petitioner's patents.

The conspiracies above involve many complex legal issues,. with other collaborating Defendants. After Petitioner's criminal demise, William Barrows and Hopkins & Sutter then aided in the further criminal destruction and infringement of the Petitioner's rights by not properly litigating on behalf of the Petitioner. Barrows also defrauded Petitioner about many legal issues, thus participating in said conspiracies, to further 'set the stage' for payoff of his attorney friend, Gomer Walters, who then signed an agreement, or conversion, or final payoff for $2,500,000 or

more of what should be Petitioner's patent royalties, when he was owed only a very small amount of fees, and for his pervasive and prolonged participation in these events since the beginning.

Afterwards, the competitors listed above even eventually hired away the technical engineering expertise assembled by Petitioner, dividing it among themselves in the concerted, well planned and executed intentional destruction of Petitioner and his company as a viable competitor within medical markets, and even appointed to the Petitioner's company's board former Baxter executives and MRL associates.

Petitioner after being misled and coerced, with this criminal undue influence and fraud, into a settlement, then disclosed part of the issues to some shareholders and authorities at which time this coerced settlement was breached ultimately throwing Petitioner into an even more severe prolonged state of mental strife, poverty, loss of his home, and virtually everything meaningful to him, and finally destroying any reputation or normal life to which he is deserved. Petitioner was blackballed right out of the medical industry after inventing products ultimately responsible for saving thousands of lives in the United States and worldwide.

Petitioner has invented medical lifesaving products that have now accounted for over ONE HALF BILLION DOLLARS in sales. Petitioner has received NO ROYALTIES AT ALL on his more than 30 patents. Petitioner begs the Court to understand that this could only

have occurred due to a systematic and pervasive CONSPIRACY to DEFRAUD and DECEIVE, over a long period, by Petitioner's own former legal counsel, and Defendants, with the intent to participate in the infringement of Petitioner's own inventions or patent rights, and further, to conspire with competitors, especially Defendants of Baxter, in the deliberate destruction of Petitioner's life, with the intent to restrain trade and competition, and with the intent to permanently eliminate any just pathway of recourse, legal and otherwise, by Petitioner against Defendants. This undue influence, fraud, and moral coercion to extort from Petitioner his extremely valuable patents, valuable equity in the company he founded, disable any competition from Petitioner, and infringe his technology, is criminal, and also represents serious Patent, Federal Antitrust, Federal Securities Law, and Federal RICO Racketeering violations.

Classically, as a whole conspiracy, involving multiple competitors conspiring together 'horizontally' in collaboration with others to cripple or disable a single potential competitor to limit competition, restrain trade, extort and infringe his patent rights, is also a violation of the Sherman Act and when utilizing criminal actions or methods upon more than one related entity is a violation of the Federal RICO racketeering laws, and when done with an intent to manipulate equity or securities is a violation of Federal Securities Laws. Defendants in this case intended from the beginning to violate these Federal laws through application of the other means. Certain other named defendants aided and abetted these competitors in these violations..

Heart Disease is the nation's number one killer. Actions by the defendants have disabled not only Petitioner's abilities to openly and fairly compete, further develop, and benefit from his life saving patents, but also have prohibited Petitioner from saving additional lives on a national scale through the proven and expanded application of his unique expertise. Petitioner's designs have never been completed. This alone is a serious ongoing crime against the Petitioner and the United States.

Exhibits for above statements are available in the 4/4/97 - MEMORANDUM (Incomplete Amended Complaint) by pro se Petitioner Roger Heath (exhibits 1-31 and A-Z) (Docket #246 - 4/22/97)

Other issues identified concerning this complex case are in the record from three basic parties, The District Court, Eugene Friedman (an attorney appointed by the District Court), and Roger Lee Heath, the Petitioner.

On March 19,1996 The District Court found the following issues or claims could be identified within the Petitioner's Original Complaint and subsequent responses;

> "fraud by Petitioner's former lawyers, conversion of patents by Petitioner's former patent attorney, patent infringement, contributory infringement, unfair competition, defamation, blackmail, sexual harassment, extortion, misrepresentation, legal malpractice, collusion, payoffs, and that William Barrows and Hopkins & Sutter failed to rectify

> Petitioner's demise." (see MINUTE ORDER 3/19/96 – Docket #217 - 4/22/97)

The district court order of March 19th also granted Petitioner's in forma pauperis motion and the Court spent the better part of a year attempting to appoint counsel to Petitioner. This was never successful, as no attorney appointed by the court could represent Petitioner due to Conflicts of Interests or did not ever file an appearance on behalf of Petitioner.

On October 25, 1996 additional or same issues concerning this case were identified by Eugene Friedman, an attorney appointed by the District Court;

> "... Friedman reached two important conclusions concerning the further handling of this case. First, the action concerns various bases only peripherally connected to patent law. These bases specifically include legal malpractice, breach of fiduciary responsibilities, breach of contract, antitrust law, securities violations, fraud, conversion, and possibly others." (see MEMORANDUM 4/4/97 - Exhibit 7 - Docket #246 - 4/22/97)

On March 18, 1997 the District Court suddenly, and without any prior notice to Petitioner, sua sponte dismissed the Case. The Petitioner's case was dismissed, with prejudice, due to a dispute over accounting terms in which the District Court concluded that Petitioner defrauded the District Court on his application for counsel on a Forma Pauperis form. The Order did not address any of the above

serious legal issues at all or other reasons for original appointment of counsel, provided under Rule 3.82, and requested by Petitioner in his motion. No hearing was ever allowed for the Petitioner to produce evidence the numbers and accounting terms listed on his application were accurate. (*See Appendix*) (also see 3/19/96 MINUTE ORDER - Docket #217 4/22/97)

This occurred even though the Court never even appointed an attorney that signed an appearance on behalf of Petitioner.

On April 4, 1997 the Petitioner filed in the District Court a Motion for Reconsideration of the order to dismissal. Contained in this filing is a Memorandum or Incomplete Amended Complaint with attachments, which lists many specific statutes and related issues that are the issues in his case. This MEMORANDUM also contained new evidence from shareholders, and others, of securities fraud and secretly kept payoffs potentially in the millions of dollars. (See 4/4/97 - MEMORANDUM (Incomplete Amended Complaint) by pro se Petitioner Roger Lee Heath in support of motion for reconsideration of the order for dismissal and Incomplete Amended Complaint. (exhibits 1-31 and A-Z) (Docket #246 - 4/22/97))

Petitioner is PRO SE, not an attorney or an accountant, and without legal background in most of these issues. It is important to understand that Petitioner's first Complaint was filed in haste, with broad claims, and numerous defendants, after Petitioner had considerable and unsuccessful attempts to retain counsel, and after Petitioner

learned he had been deliberately misled, by his own counsel, who are defendants in this case, regarding many important legal issues surrounding his case. After filing his first Complaint, Petitioner has been in the process of learning the Court's rules as he struggles along attempting, to the best of his abilities, to understand the rules, forms, accounting principles, and the complex legal issues surrounding his case.

The Petitioner filed an Appeal in the Seventh Circuit on May 19, 1997. The Incomplete Amended Complaint. (exhibits 1-31 and A-Z) (Docket #246 - 4/22/97)) mentioned above, approximately three inches thick, turned up missing from the records in the Clerk's office and an original copy had to be refiled by Petitioner for the 7th Circuit.

On November 6, 1997 the Seventh Circuit appointed University of Chicago Law School Professor, Dr. Gary H. Palm, as Amicus Curiae to produce an opinion. He was directed in the Order to comment regarding *Denton v. Hernandez*, 504 U.S., 34 (1992). Dr. Palm and his associates also collected facts in the case, including detailed facts about Petitioner's finances directly from the Petitioner's accountant or C.P.A to determine if the accounting number used by the Petitioner was fraudulent.

On March 23, 1998 Dr. Palm produced an opinion concluding the Petitioner's numbers presented in his Application for Forma Pauperis were accurate and NOT FRAUD. In addition, the professor concluded that the District Court had acted in conflict with U.S. Supreme Court and U.S. Appellate Court decisions by not providing a fair hearing where all these facts could be revealed. Dr. Palm

affirmed his positions and findings in a Reply Brief. Both of these briefs are attached within the Appendix of this filing. (*See Appendix*)

The Court never allowed Dr. Palm opportunity for Oral Argument after he filed a Motion for Postponement on June 4, 1998 due to illness, and also did not allow Petitioner an opportunity to participate in Oral Argument after he filed the appropriate card and even filed a Motion to do so on June 3, 1998. No oral arguments were permitted by the Circuit Court.

In an order dated August 3, 1998 the Seventh Circuit Court of Appeals agreed with the District Court. and affirmed its decision. The Appellate Court did not even respond directly to the crucial and pertinent issues found and presented by Professor Palm at all. The Appellate Court did not even respond to the very serious civil and criminal issues, in the Petitioner's Case, already previously identified by the District Court and attorney Friedman, and the Petitioner.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

1. THE COURT OF APPEALS FOR THE 7TH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH CONFLICTS WITH RELEVANT U.S. SUPREME COURT AND APPELLATE COURT DECISIONS.

Rule 10(c) of the Rules of the Supreme Court (Jan. 16, 1997) states,

> "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

The 7th Circuit has ruled in direct conflicts to Supreme Court decisions in *Roadway Express, Inc. v. Piper*, 447 U.S. Amicus stated in his brief.

> "The district, have initially concluded that Mr. Heath did not commit fraud, reversed its finding and sua sponte dismissed his case with prejudice. (App. 16). The court gave him no notice of this sanction prior to the order of dismissal. He had no opportunity to prepare a defense and present it in a full evidentiary hearing. Because dismissal with prejudice is the most extreme sanction, the district court violated Mr. Heath's Fifth Amendment rights by denying him these due process protections. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980)."

and further Amicus stated,

> "Despite concluding during the in camera proceeding that Mr. Heath had not committed fraud (Id., pp. 15,19), one week later the District Court increased the sanction against Mr. Heath by sua sponte dismissing his case with prejudice. (App. 16). Again, however, the court gave Mr. Heath no

notice prior to the order itself that the court was considering this penalty. (Id.). At no point during the in camera hearing did the court give Mr. Heath any indication that it was considering sanctions. At the conclusion of the hearing, the court, having made no finding of fraud, vacated the finding of in forma pauperis. (App. 21, p. 16). Indeed, the court gave made clear suggestions that Mr. Heath's case would go forward, asking whether he was going to amend his complaint and suggesting he retain counsel. (Id., pp. 16, 20). The lack of notice prior to the sanction violates Mr. Heath's due process rights under the Fifth Amendment. U.S. Const. amend. V.

The Supreme Court has established that a cause of action is a type of property interest protected by the Due Process Clause. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-29 (1982) (citing Martinez v. California, 444 U.S. 277, 281-82 (1980)). Further, it is well settled that due process requirements apply to sanctions. Chambers v. NASCO, Inc., 501 U.S. 32, 40 (1991); Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958). Specifically, the Court has stated that sanctions "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Roadway Express, Inc., 447 U.S. at 767 (examining the due process concerns of imposing attorneys' fees pursuant to court's inherent powers). Moreover, because dismissal with prejudice is the most extreme sanction, it merits the highest due process protections. " (*See Appendix*)

A. The Issue Whether Litigants Proceeding Under the *In Forma Pauperis* Statute Are Entitled to a Hearing before Their Case May be Dismissed for Filing an Allegedly False Affidavit of Poverty Is an important Federal Question:

1. It is important because there are thousands of in forma pauperis litigants who need the Supreme Court's guidance about what procedure is required. Litigants should have notice of the issues the Court is going to decide in order to have reasonable time prepare a defense. Litigants should have a hearing where all pertinent facts may be made available to provide for a just and fair ruling.

2. This is now especially important in light of the amendment to the *in forma pauperis* statute which now mandates dismissal. Now even more in forma pauperis litigants will be facing this issue.

3. This is very significant as many in forma pauperis litigants are proceeding *Pro Se*, and are thus especially in need and deserving of even more guidance by the court.

A. The Decision of the Court of Appeals for the 7th Circuit Is In Direct Conflict with the United States Supreme Court's Decision in *Roadway Express v. Piper*.

1. When the court seeks to permanently deprive a litigant the opportunity to have his or her claim heard on the merits, due process concerns dictate that a hearing must be given prior to the imposition of this sanction. See *Roadway Express, Inc.*, 447 U.S. at 767; *Harris*, 664 F.2d at 390.

2. Every litigant should be entitled to a hearing and the 7th Circuit in this case denied Petitioner any such hearing. This is important to all litigants in all courts through-out the United States. The ruling in this case should not conflict with existing Supreme Court rulings regarding this issue. Petitioner in this case should be allowed the same fair and reasonable opportunities to produce supporting materials equal to the opportunities already afforded presently to other litigants.

C. The Decision of the Court of Appeals for the Seventh Circuit Is in Direct Conflict with the United States Supreme Court Decision in *Denton v. Hernandez.*

1. The Question whether dismissal under a in forma paupris statute may be with prejudice is important since it is preferable to have a case heard on its merits rather than being simply thrown out on a procedural issue. This has been addressed by *Denton v. Hernandez*

The Supreme Court's decision in *Denton v. Hernandez*, 504 U.S. 25, 34 (1992) precludes a court from dismissing a complaint with prejudice under § 1915 for filing a false affidavit of poverty. However, even a dismissal without prejudice would be an abuse of discretion as applied to Petitioner's case because the district court's finding of fraud was erroneous according to Professor Palm and his associates findings on behalf of the Court. *(See attached Appendix*)

Section 1915 fails to specify whether dismissal for filing a false affidavit of poverty may be with prejudice. § 1915(d) (West 1994); § 1915(e)(2) (West 1996).

In *Denton*, however, the Supreme Court held that "[b]ecause a § 1915(d) dismissal is not a dismissal on the merits, but rather an exercise of the court's discretion under the in forma pauperis statute, the dismissal does not prejudice the filing of a paid complaint making the same allegations." *Denton*, 504 U.S. at 34. In reviewing a determination of frivolousness, the Court wrote that a dismissal may have res judicata effect on *frivolousness* determinations for future *in forma pauperis petitions*. Id. (emphasis added). Thus, only determinations of frivolousness may result in dismissal with prejudice. See Id. Because a district court's determination that the allegation of poverty is untrue is not a decision on the merits, a litigant may not be precluded from filing a paid complaint. See Id.

The 7th Circuit beginning with *Mathis v. New York Life Ins. Co.*, 133F.3d 546, 547 (7th Cir. 1998) has begun to produce a pattern of decisions in this area conflicting with Supreme Court opinions.

The attached Appendix contains both briefs by Professor Palm detailing these issues and citing more relevant cases, as well as the basis of finding that, in fact, the Petitioner did not commit fraud. Since the Petitioner was not allowed a hearing with which to present his accountant and materials on these matters, he was not allowed reasonable time or a venue to

show both pertinent evidence and merit and the validity of his filing. Dr. Palm concludes,

> "this court should find that the district court inappropriately resolved genuine issues of disputed fact. *Denton*, 504 U.S. at 34. During the in camera proceeding, Mr. Heath sought to raise a dispute regarding the allegations of fraud. (App. 21, pp. 13-15). However he was prevented from doing so because the district court denied him the opportunity to present evidence."

Petitioner, like others within the Courts, should be allowed a hearing on the merits within his case and the above facts that clearly demonstrate the Court came to an erroneous conclusion of fraud and then abused through dismissal with prejudice which is conflicting with the Supreme Court decisions.

2. DEFENDANTS HAVE DEPRIVED PETITIONER OF BENEFITS OF OVER ONE HALF BILLION IN SALES OF HIS MORE THAN 30 LIFE-SAVING PATENTS OR INVENTIONS. DEFENDANTS ARE COMPOSED PRIMARILY OF VERY LARGE COMPETITOR CORPORATIONS , SOME OF WHICH HAVE ALREADY PLED GUILTY TO PAYOFFS, CONSPIRACY, AND RICO VIOLATIONS, OR INTERFERENCE CONCERNING OTHER'S PATENTS OR COMPETITIVE BUSINESSES IN OTHER CASES. PETITIONER IS PRO SE AND AN INDIVIDUAL ATTEMPTING TO OBTAIN REMEDIES. FOR SIMILAR

CRIMES. WHICH THE COURTS HAVE NOT ADDRESSED VIOLATING F.R.C.P. RULE NUMBER 61.

Rule 61 of the Federal Rules of Civil Procedure states,

> "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

This rule is extremely important in any decision because each litigant though-out the nation should be guaranteed that the courts obligations to deliver substantial justice, and that the litigant's other rights, are not to be compromised by minor inconsequential common human errors that are normally occurring within all legal venues and all proceedings.

If this Rule is not required, then any court within the United States may simply dismiss a case on the most minor of errors. Errors of such character are obviously much more probable with *pro se* litigants who are not trained as either accounting or legal professionals.

The courts have unfairly drawn false conclusions by utilizing accounting numbers in it's ruling out of context and that have absolutely no relevance what-so-ever to Petitioner's original application submitted for forma pauperis, which has been the subject of the case dismissal. Accounting periods are unfairly used by the courts which do not even apply to the period asked for upon the original form at all. Also, the forma pauperis form is sufficiently vague

enough as to ask for salary and wages, and the Petitioner has neither because he is self-employed. The Petitioner's income has varied widely as well. In addition, the order does not even take into fair and proper consideration the timing of the availability of accounting information in the full relative context of Petitioner's statements in the in-camera proceeding. The Petitioner provided an affidavit from a fully qualified registered C.P.A. with his application form explaining relevant accounting information. There was never any attempt to mislead the court at all. This has been substantiated by Petitioner and independently by Amicus, Professor Gary Palm. (*See Petitioner's Appeal to the 7th Circuit dated May 19, 1997 and Appendix*)

On March 19, 1996 The District Court found the following issues or claims could be identified within the Petitioner's Original Complaint and subsequent responses;

> "fraud by Petitioner's former lawyers, conversion of patents by Petitioner's former patent attorney, patent infringement, contributory infringement, unfair competition, defamation, blackmail, sexual harassment, extortion, misrepresentation, legal malpractice, collusion, payoffs, and that William Barrows and Hopkins & Sutter failed to rectify Petitioner's demise." (see MINUTE ORDER 3/19/96 – Docket #217 - 4/22/97)

On October 25, 1996 additional or same issues concerning this case were identified by Eugene Friedman, an attorney appointed by the District Court;

> "... Friedman reached two important conclusions concerning the further handling of this case. First, the action concerns various bases only peripherally connected to patent law. These bases specifically include legal malpractice, breach of fiduciary responsibilities, breach of contract, antitrust law, securities violations, fraud, conversion, and possibly others." (see MEMORANDUM 4/4/97 - Exhibit 7 - Docket #246 - 4/22/97)

Not only these findings have occurred, but some defendants or their associates have already pled guilty in well known cases for many other similar payoffs and R.I.C.O. violations. Defendant Baxter was convicted of bribery in violation of the Arab Israeli Boycott in a suit filed by the U.S. Attorney in Chicago paying a $6,000,000 fine. In 1996 Baxter was to pay $8,000,000 dollars in damages for being found guilty in a suit alleging business interference in inventor Brian Zdeb's competing business. More recently, under allegations by additional competitors, both Baxter and Caremark were sued successfully for R.I.C.O. violations in *Pharmacare v. Caremark*. 965 F. Supp. 1411 (Hawaii) 1996. Caremark eventually pled guilty to mail fraud paying $9,000,000 and later bribery of physicians paying $20,000,000 in fines. Petitioner names at least one former executive of Caremark and Baxter in this case and also alleges R.I.C.O. violations.

Rule 61 of the Federal Rules of Civil Procedure, to which both the district court and court of appeals are subject, mandates that these very serious potential violations MUST be weighed relative to the other rights of the parties

involved. Yet in no instance does each court fulfill its responsibility to fully test the merits within Petitioner's allegations, or the very serious potential violations already identified by the district court and then fairly measure their importance to the dispute over a small financial accounting term on a forma pauperis form by Petitioner and how their decision might affect the rights of the parties.

Indeed, the Supreme Court should address these very important issues. If these allegations have merit, as they already have had in other very similar cases, then the action of dismissing a case under any circumstances where valid criminal charges are brought forth and are not at all properly addressed as the rules of the court require, puts actual criminals at an unaccounted for advantage to freely commit serious civil or criminal acts in almost any case without any concern for the consequences in law that should follow.

In fact, if the courts do not have to follow this rule, then no accountability for merit to serious potential violations are made to any court in these United States, regardless of Petitioner's case. Thus this issue is extremely important to any litigant who may have valid allegations.

In addition, in this case, where Petitioner's inventions are widely acclaimed and responsible for saving thousands of lives through-out the United States an assessment could even be made to the actual loss of human life in the United States due to the destruction of Petitioner and his company as a viable competitor by his primary competitors restricting not only competition, but also his ability to save more lives through unrestrained extensions of his expertise within the

United States. (*See* MEMORANDUM 4/4/97 - Docket #246 - 4/22/97)

Potential R.I.C.O. violations also impact the rights of the citizens, and even the government, of the United States to the benefits of a competitive market, which also, in this case, involves the actual saving, or not saving, of human lives ultimately depending upon the unrestrained development and competitive marketing of new critical medical technologies.

The courts violated their responsibilities required under F.R.C.P. Rule 61 and violated the Petitioner's Fifth Amendment Due Process Rights as well as the other rights to which he is entitled within his allegations. In this light, and in the light of such serious potential civil and criminal violations, the courts also abused their discretionary privileges under Sec.1915. Petitioner is quite certain that no one has intended such privileges to be used to let such potentially serious violations, 'off the hook'. Since the Petitioner is not guilty of a fraud, the abuse of this responsibility, and the above statute, is even of substantially greater magnitude. (*See Appendix*)

3. THE COURT OF APPEALS FOR THE 7TH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH CONFLICTS WITH RELEVANT U.S. SUPREME COURT AND ITS OWN DECISIONS WITH REGARD TO CONSTITUTIONAL PATENT LAW AND FUNDAMENTAL CONSTITUTIONAL RIGHTS OF AN INVENTOR.

Patent rights are granted under the United States Constitution, Article 1 Section 8:

> "To promote the progress of science and useful arts, by securing for limited times to authors, and inventors, the exclusive right to their respective writings and discoveries. . ."

Petitioner's case is an action arising out of his rights under Article 1, Section 8 of the United State's Constitution.

The United States Supreme Court in *Littlefield v. Perry*, 21 Wall. (88 U.S.) 205,222, 22 L.Ed. 577 (1875) in a test of jurisdiction, stated,

> "An action which raises the question of infringement is an action arising 'under the [patent] law', and one who has the right to sue for infringement may sue in the [federal] court. Such suit may involve the construction of a contract as well as the patent, but will not oust the court of its jurisdiction. If a patent is involved, it carries the whole case."

In the above decision by the Supreme Court it was determined that the Constitutional rights of the inventor will take precedence over all other issues. The important Federal Question is whether this implies precedence over discretionary procedures such as those within Section 1915. If rights granted by the United States Constitution are involved and they, 'carry the whole case.', then no discretionary procedure may be used to deny an inventor his

or her Constutionally granted rights. Such procedures, in this context, are unconstitutional.

This question is fundamental to the Constitution and absolutely critical to hundreds and thousands of inventors or writers now and in the future in the United States.

In Petitioner's case an absurdly simple dispute over accounting terminologies was subject used to deny Petitioner's Constitutional rights previously granted by the United States Patent and Trademark Office to Petitioner for patents worth hundreds of millions, if not several billions of dollars. The use of a discretionary procedure within Sec. 1915 was a violation of Petitioner's Constitutional rights.

CONCLUSION

The Court denied the Petitioner a hearing where facts could be properly and fairly presented and in the process violated existing Supreme Court and other Appellate decisions. The Petitioner simply did not commit a fraud on the court. The 7th Circuit Appeals Court admits in its order that the Petitioner attached an affidavit to his application for in forma pauperis from his accountant explaining the figure presented upon his application. Amicus Curiae appointed by the court confirms this as a matter of fact and that thus there was NO FRAUD or basis for dismissal of Petitioner's case to begin with under Sec. 1915. The Amicus is the ONLY one to view all the pertinent financial records of the Petitioner, and thus the ONLY one who could have formed a qualified opinion in this matter.

The district court found multiple potential violations by defendants of an extremely serious civil and criminal nature within the Petitioner's case. These violations have, and are, even costing the saving of precious human life throughout this nation. To this day all these remain totally uncontested, or even thoroughly evaluated for their merit, even though some of the defendants have pled guilty to similar crimes in other instances. F.R.C.P. Rule 61 dictates that the courts exist to deliver substantial justice and MUST NOT compromise the rights of the parties for harmless error in any case. The Petitioner, and all other litigants within the land deserve to be assured that no Court is above its own rules and that its obligations to protect all the rights of all the parties in any event will occur. To dismiss this case over a dispute in accounting terminology when many human lives through-out the United States are at risk, is a travesty beyond words. The American People, much less the Petitioner, deserve far better.

The Supreme Court has ruled that if patent issues are involved that all other issues in a case must follow. The actions by the lower courts conflicts with this Supreme Court ruling and violates Petitioner's Constitutional Rights under Article 1, Section 8 of the United States Constitution. Inventors constitutional rights in this country should not be compromised by any other issues in litigation.

For the above very important reasons, and those attached, Petitioner respectfully prays the Court to grant this writ.

Respectfully submitted,

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APPENDIX

(unpublished order not to be cited per Circuit Rule 53)

United States Court of Appeals
For The Seventh Circuit
Chicago, Illinois 60604

Submitted June 5, 1998
Decided August 3, 1998
Before
Hon. RICHARD J. POSNER, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

Roger L. Heath, *Plaintiff-Appellant*

No. 97-1844 v.

Gomer W. Walters, Baxter International,
et. al., *Defendants-Appellees*

Appeal from the United States District Court
For the Northern District of Illinois
No. 94 C 7812
George Lindberg, Judge

ORDER

On December 30, 1994, Roger Heath filed a *Pro Se* complaint against many defendants alleging patent infringement. He applied to proceed in forma pauperis. An in

forma pauperis application asks for gross and net salary or wages. Heath indicated that he had a gross annual income of $33,000 and a net anniual income of $22,000. In April of 1995, Heath moved for appointment of counsel and filed an amended application to proceed in forma pauperis, indicating am "Average income (NET of TAX) = 2016.17 annually." Heath attached several documents to his motion for appointment or counsel including a report from his accountant. This report indicates that Heath had $35,478 in gross income from April 1, 1994 to March 31, 1995. The report also mentions the figure that Heath included on his application to proceed in forma pauperis, indicating that Heath realized a net gain of $2016 after tax and *after living expenses*. The Court granted Heath motion to proceed in forma pauperis and appointed counsel.

Appointed counsel requested an in camera hearing for a purpose for relief from appointment. Counsel's original stated reason for relief was a conflict of interest. At the district court's insistence, counsel revealed his knowledge of Heath's financial affairs. Counsel had financial records from Heath indicating a net income in 1994 of $20,740. The Court invited Heath to to explain the discrepancy. Heath answered that his application to proceed in forma pauperis should have reflected an income of $12,800 and that his financial situation was complicated because he is self employed and because he owes back taxes. At the conclusion of the hearing, the court responded that Heath had misled the court, perhaps not fraudulently but definitely with the intent to mislead. The court vacated it's earlier finding that heath was eligible to proceed in forma pauperis and eligible for appointed counsel.

A week later the court issued a written ruling, finding that Heath had indeed committed a fraud on the court by submitting false information on his application to proceed in forma pauperis in violation of 28 Sec. 1915(d). The Court dismissed Heath case with prejudice. Heath filed a Motion for Reconsideration submiting additional documents. His motion was denied. Heath appeals.

There is some question whether we are reviewing a dismissal under the old statute, Sec. 1915(d), or under that statute's recent replacement, Sec. 1915(e)(2). The district court relied on the old Sec. 1915(d). We presume it did so because Heath's case was originally filed while the old version of the statute was stillin effect. The major difference installed by the new statute is to make dismissal mandatory, not discretionary, if the plaintiff's claims are frivolous or the plaintiff files a false affidavit of poverty.

Some of the parties urge us to apply Sec. 1915(e)(2) retroactively while others implore us not to do so. We do not see a nee to discuss at length whether it was proper for the district court to use the old version of the statute. The district court had applied Sec. 1915(e)(2), the only difference would be that dismissal would have been mandatory, not discretionary. Because applying either statute led in this case to the same result, we will not dwell on the propriety of applying the old version rather than the new.

It is not entirely clear what standard of review the court uses to review a dismissal under Sec. 1915(d) for a false allegation of poverty. When a district court dismisses a case under Sec. 1915(d) for frivolousness, we review the

determination for abuse of discretion "[b]ecause the frivolousness determination is a discretionary one." *Denton v. Hernandez* ,504 U.S. 25,33 (1992). Other circuits have applied the abuse of discretion standard to dismissals for false allegations of poverty. See Dawson v. Lennon, 797 F 2d. 934, 935 (11th Cir., 1986) (*per curiam*); Harris v. Cuyler, 664 F.2d 388, 390 (3rd Cir.,1981) There is no need for us to decide this point because Heath's claim fails under either an abuse of discretion or a *de novo* standard.

Heath challenges the dismissal of his case with prejudice for filing a false affidavit of poverty. He argues that his case should have been dismissed without prejudice to allow him to refile and pay the necessary costs. He relies on *Denton* for the proposition that a 1915(d) dismissal is not on the merits(meaning, we think, without prejudice) However, Denton held only that a Sec. 1915(d) dismissal for frivolousness was normally without prejudice, leaving the plaintiff free to refile as a paying party. *Denton* reasoned that litigants without financial means should have the opportunity to have their grievances decided by the courts just like wealthier litigants have a financial incentive not to file frivolous suit, while indigent litigants lack that incentive. Dismissal without prejudice replaces the financial incentive not to file frivolous lawsuits.

We find *Denton* distinguishable Dismissing a case for filing a false affidavit is a sanction for committing a fraud on the court. In contrast, dismissing a case for frivolousness is not necessarily a sanction. A court would not normally dismiss a case *sua sponte* if it were filed by a paying plaintiff. Rather, it would be subject to a motion to dismiss

for failure to state a claim or a motion for summary judgement by the defendant with all the procedural protections normally observed.

In *Smith-Bey v Hospital Adm'r*, 841 F.2d 751,756 (7th Cir., 1988) we noted that Congress was silent in Sec. 1915(d) as to whether dismissals for filing false affidavits of poverty should be with or without prejudice. We extrapolated from that silence that Congress intended to vest the district court with discretion to make that decision. *See Id.* We recently rvisited and reaffirmed *Smith-Bey. In Mathis v. New York Life Ins. Co.*, 133F.3d 546, 547 (7th Cir.), the district court dismissed the plaintiff's case with prejudice under the new Sec. 1915(e)(2) for filing a false affidavit of poverty. Citing *Smith-Bey* with approval, e held again that Congress's silence is best interpreted to leave the decision to the district court whether to dismiss a case with or without prejudice. *See Id.* Contrary to Heath's contentions otherwise, a court has the discretion to dismiss a case with prejudice under 1915(d).

The question remains whether the district court erred in dismissing Heath's case with prejudice. We think not. Heath's financial records do not support a finding that he had a gross or net income of $2016 in 1994. The appication to proceed in forma pauperis clearly does not invite the applicant to subtract living expenses in an attempt to mislead the court.

Heath also argues that his ase should not have been dismissed for filing a false affidavit of poverty without affording him notice of the impending dismissal and an

opportunity to be heard. However, Heath did have an opportunity to be heard. He was present in the *in camera* hearing and was afforded the opportunity to explain the discrepancies in his financial records. He even admitted at the hearing that he should have reported income of over $12,000. We se no inadequacy in the protections afforded Heath here.

Amicus raises due process and equal protection challenges to Sec. 1915. We reject the arguments as without merit.

For the foregoing reasons, the judgement of the district court is AFFIRMED.

*The parties requested a postponement of oral argument in the case. We vacated the order scheduling oral argument for June 5, 1998 and we decide the case on the briefs.

COPY OF BRIEF BY AMICUS CURIAE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

ROGER L. HEATH,
Plaintiff-Appellant, Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94 C 7812 The Honorable George W.

Lindberg, Judge.

v.

No. 97-1844

GOMER W. WALTERS, VERNON R. LOUKES, JR., NADEEN BERGER, et al. ,
Defendant-Appellees.

BRIEF OF AMICUS CURIAE

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JURISDICTIONAL STATEMENT

Mr. Heath appeals from the district court's March 18, 1997 order dismissing his complaint with prejudice pursuant to 28 U.S.C. §1915. He presented federal claims such as violations of patent, antitrust and securities laws. He filed his notice of appeal on April 8, 1997. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the district court improperly denied Mr. Heath notice of and an opportunity to respond to the allegations of fraud before imposing the sanction of dismissal with prejudice in violation of the Fifth Amendment Due Process Clause.

2. Whether 28 U.S.C. § 1915(e)(2) (West Supp. 1996) may be applied retroactively.

3. Whether § 1915(e)(2) violates the Fifth Amendment Equal Protection Clause.

4. Whether the district court properly dismissed Mr. Heath's case with prejudice based on a finding of false affidavit of poverty under § 1915.

STATEMENT OF THE CASE

On December 30, 1994, Mr. Heath filed a pro se complaint in the district court, alleging, inter alia, that certain defendants infringed his patents rights, acquired for his medical inventions. (App. 1)[1]. On this date he applied to proceed in forma pauperis, stating a gross income of $33,000 and a net income of $22,000. (App. 2). On April 25, 1995, Mr. Heath amended his application to proceed in forma pauperis, stating that his average income, net of tax, equaled $2016.17 annually. (App. 3). Shortly thereafter, Mr. Heath filed a statement from his accountant which explained that the amended affidavit reflected changes in his net worth for the twelve months between April 1, 1994 and March 31, 1995. (App. 4).

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[1] References to the record below are to the pages of the attached appendix.

After the court denied his motion for appointment of counsel as moot,(App. 5), Mr. Heath filed a Motion for Reconsideration of Motion for Appointment of Counsel on October 30, 1995, to which he attached documents showing how he arrived at the figure on his affidavit. (App. 6). The court granted his motion. (App. 7). Each of the attorneys subsequently appointed to represent Mr. Heath, with the exception of Mr. Friedman, was dismissed for conflict of interest. (App. 8, 9, 10, 11, 12, 13, 15).

On March 11, 1997 the court conducted an in camera hearing during which Mr. Miller, attorney appointed for Mr. Heath, revealed a conflict of interest. (App. 21, pp. 3-4). After the court had dismissed him as counsel, Mr. Miller proceeded to tell the court he thought there was a discrepancy between Mr. Heath's in forma application and his tax returns. (Id., pp. 8-9). Over Mr. Heath's objections, he presented to the court three documents: Mr. Heath's 1995 tax returns, a letter from Mr. Heath to Mr. Miller's law office in which Mr. Heath listed his average income over the last six years as being $12,800; and a letter from Mr. Enterline to Mr. Heath, stating that his average net income of self employment for the years 1990 to 1995 was $9476[2], and that his self-employment income as reported on his 1995 income tax return, minus his tax obligations, was $13,826. (Id., pp. 10-11; Letter from Mr. Heath; Letter from Mr. Enterline; 1995 Tax Return).

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[2] The difference in the two numbers representing average income for the past six years is that the $12,800 represents average adjusted gross income, whereas the $9476 approximates taxable income. (App. 17, Compare and Contrast Income Document)

After this information was presented, the district court concluded that Mr. Heath was not entitled to proceed in forma pauperis and dismissed Mr. Friedman as counsel. (App. 21, p. 16) The court stated, however, that it did not find Mr. Heath's conduct fraudulent. (Id., pp. 15, 19). Nonetheless, on March 18, 1997, the District Court sua sponte dismissed his complaint with prejudice. (App. 16). Mr. Heath received no prior notice that such a sanction was being proposed, nor was he afforded a hearing to contest the dismissal. (Id.)

Mr. Heath filed a Motion for Reconsideration of Order of Dismissal to which he attached an affidavit of Mr. Enterline explaining again how he arrived at the figure, $2016.17. (App. 17). The court denied Mr. Heath's motion, (App. 18), and on April 10, 1997 he filed this appeal. (App. 19).

SUMMARY OF ARGUMENT

This district court's decision to dismiss Mr. Heath's complaint with prejudice under § 1915 must be reversed as an abuse of discretion. First, the court deprived Mr. Heath of his Fifth Amendment due process rights by failing to give him notice of the allegations against him and of the proposed sanction. Given that the district court chose the most extreme sanction to levy against him, Mr. Heath was entitled to a full evidentiary hearing to present his own evidence and witnesses.

Second, the new provision governing dismissals, §1915(e)(2), may not be applied retroactively because it imposes a new legal consequence to past conduct.

Specifically, because the amendment mandates dismissal, it precludes a court from considering lesser sanctions. Moreover, Congress intended the amendment to be applied prospectively.

Third, in the event this court concludes that the amendment may be applied retroactively, it should nonetheless be struck down as a violation of the Fifth Amendment equal protection clause. Wealthier litigants who need not proceed under §1915(e)(2) enjoy at least the possibility that a court will exercise its discretion in their favor when they are accused of fraud. Fed. R. Civ. Proc. 11(c). Poor litigants have no such chance because dismissal is mandatory under §1915(e)(2). The government's interest in curbing frivolous litigation is not rationally related to this classification.

Fourth, dismissal with prejudice for filing a false affidavit was improper because the determination did not reach the merits of Mr. Heath's claims. Denton v. Hernandez, 504 U.S. 25 (1992). In addition, the court's conclusion that Mr. Heath intentionally committed fraud, cannot stand in light of his repeated disclosures regarding his affidavit. Lastly, dismissal with prejudice was improper because the defendants suffered no prejudice as result of Mr. Heath's filings.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY DENIED MR. HEATH AN OPPORTUNITY TO RESPOND TO THE ALLEGATIONS OF FRAUD BEFORE IMPOSING THE SANCTION

OF DISMISSAL WITH PREJUDICE IN VIOLATION OF THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

The district, have initially concluded that Mr. Heath did not commit fraud, reversed its finding and sua sponte dismissed his case with prejudice. (App. 16). The court gave him no notice of this sanction prior to the order of dismissal. He had no opportunity to prepare a defense and present it in a full evidentiary hearing. Because dismissal with prejudice is the most extreme sanction, the district court violated Mr. Heath's Fifth Amendment rights by denying him these due process protections. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980).

A. The District Court violated Mr. Heath's Due Process Rights by Failing to Give Him Notice of the Proposed Sanctions.

An examination of the record below reveals that the district court failed to give Mr. Heath notice before it rescinded his in forma pauperis status and sanctioned him with dismissal with prejudice. First, Mr. Heath had no notice of the subject matter of the in camera hearing. His attorney, Mr. Miller, filed a motion for relief from appointment of counsel, but did not disclose the basis for seeking withdrawal. (App. 14). Only well into the hearing were the allegations of fraud brought against Mr. Heath. After being dismissed for conflict, Mr. Miller first raised the suggestion that Mr. Heath misrepresented his financial status. (App. 21, p. 8-9).

Despite concluding during the in camera proceeding that Mr. Heath had not committed fraud (Id., pp. 15,19), one week later the District Court increased the sanction against Mr. Heath by sua sponte dismissing his case with prejudice. (App. 16). Again, however, the court gave Mr. Heath no notice prior to the order itself that the court was considering this penalty. (Id.). At no point during the in camera hearing did the court give Mr. Heath any indication that it was considering sanctions. At the conclusion of the hearing, the court, having made no finding of fraud, vacated the finding of in forma pauperis. (App. 21, p. 16). Indeed, the court gave made clear suggestions that Mr. Heath's case would go forward, asking whether he was going to amend his complaint and suggesting he retain counsel. (Id., pp. 16, 20). The lack of notice prior to the sanction violates Mr. Heath's due process rights under the Fifth Amendment. U.S. Const. amend. V.

The Supreme Court has established that a cause of action is a type of property interest protected by the Due Process Clause. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-29 (1982) (citing Martinez v. California, 444 U.S. 277, 281-82 (1980)). Further, it is well settled that due process requirements apply to sanctions. Chambers v. NASCO, Inc., 501 U.S. 32, 40 (1991); Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958). Specifically, the Court has stated that sanctions "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Roadway Express, Inc., 447 U.S. at 767 (examining the due process concerns of imposing attorneys' fees pursuant to court's inherent powers). Moreover, because

dismissal with prejudice is the most extreme sanction, it merits the highest due process protections. See Id., n.14; Logan, 455 U.S. at 434. Thus notice was but the minimum process to which Mr. Heath was entitled. Roadway Express, Inc., 447 U.S. at 767.

B. The District Court Violated Mr. Heath's Due Process Rights by Failing to Provide a Hearing Before Imposing its Sanctions.

Once the allegations of fraud were made during the in camera proceeding, Mr. Heath was given no opportunity to prepare or present a defense. The district court made its determination that he was not entitled to proceed in forma pauperis (and therefore dismissing Mr. Friedman as his attorney) during the proceeding itself. (App. 21, p. 16). While Mr. Miller was allowed to present partial financial records of Mr. Heath's, Mr. Heath was not permitted to gather and present his own evidence. (Id., p. 10-11). Instead he was expected to answer to these charges immediately after they were levied. (Id., p. 13-15). Nor was Mr. Heath given an opportunity to cross-examine the witnesses against him. Not only did Mr. Miller state that Mr. Heath misrepresented his income, the court allowed Mr. Rizzi, an attorney from Mr. Miller's office, to present allegations of fraud. (Id., p. 11-13).

Likewise Mr. Heath was improperly denied the opportunity to prepare a defense and respond to the charges before the court, concluding that "[h]e perpetrated a fraud on the court," dismissed his case with prejudice. (App. 16). He

was afforded no evidentiary hearing to contest the Court's findings and the propriety of the sanction. He had no chance to present additional financial records, to put into context the records presented by his former attorney, or to have his accountant, Mr. Enterline, explain the accounting method he used in preparing the affidavit. Considerations of fairness and due process dictate that he was entitled adequate time to prepare a defense and an opportunity to present it. Roadway Express, Inc., 447 U.S. at 767.

Two circuits have indicated that notice, opportunity to respond, and a hearing are required before a district court may impose the sanction of dismissal with prejudice under §1915. Attwood v. Singletary, 105 F.3d 610, 613 (11th Cir. 1997); Harris v. Cuyler, 664 F.2d 388, 390 (3rd Cir. 1981). Citing Rogers, 357 U.S. at 209, the Third Circuit vacated the district court's decision to dismiss with prejudice because the plaintiff, while allowed to file a motion in opposition to the defendant's motion to dismiss, was not afforded a hearing in which to explain the circumstances of the filing of the affidavit of poverty. Harris, 664 F.2d at 390. In Attwood, 105 F.3d at 613, the court dismissed plaintiff's claim with prejudice under Rule 11 as well as 1915(d), rejecting plaintiff's claim that he was denied a hearing because he had been afforded one on this issue in a separate suit. Further, some courts, without directly addressing procedural implications of dismissal under §1915, have nonetheless afforded the plaintiff an evidentiary hearing. See e.g., Giordano v. Powell, 1994 WL 461702, p. 1 (D.N.H. 1994); McCoy v. White, 145 F.R.D. 393, 394 (W.D. Mo. 1992); Green v. Wyrick, 428 F.Supp. 728, 730 (W.D. Mo. 1976). Mr. Heath, however was not even given the opportunity to

respond with a brief or in oral argument before the court dismissed his complaint. (App. 16).

Although the 7th Circuit has not confronted the due process question with respect to §1915, in judicial proceedings which may be analogized to dismissal under this statute--sanctions under Rule 11 and dismissal under Rule 12(b)(6)--the requirements of notice and opportunity to respond are the minimum guarantees.

Rule 11 requires that a sua sponte action by the district court concerning the imposition of sanctions include notice and an opportunity to respond. Fed. R. Civ. P. 11(c). This formality is intended to ensure due process. Johnson v. Waddell & Reed, Inc., 74 F.3d 147 (7th Cir. 1996). Moreover, a hearing is required when it would assist the court in making its decision whether to impose Rule 11 sanctions. Kapco Mfg. Co., Inc. v. C&O Enter., Inc., 886 F.2d 1485, 1495 (7th Cir. 1989) (reviewing sanction of attorneys' fees). The value of a hearing in this case would have been particularly high given the complexity of Mr. Heath's financial information. Perhaps it would have prevented the district court's misunderstanding with respect to Mr. Heath's affidavit. (App. 16). Dismissal with prejudice, a sanction the 7th Circuit has labeled "draconian," Barnhill v. United States, 11 F.3d 1360, 1367 (7th Circuit 1993) (citing Marrocco v. General Motors Corp., 966 F.2d 220, 223 (7th Cir. 1992)), surely merits the procedural protection of a hearing.

Similarly, under Federal Rule of Civil Procedure 12(b)(6), sua sponte dismissal without notice and a hearing is

improper, precisely because the result of this action is to permanently deny the plaintiff his or her day in court. Shockley v. Jones, 823 F.2d 1068, 1073 (7th Cir. 1987); English v. Cowell, 10 F.3d 434, 437 (7th Cir. 1993). There is no reason why petitions for in forma pauperis should receive less procedural protections when the sanction is dismissal with prejudice. Harris, 664 F.2d at 390; Attwood, 105 F.3d at 613. Because the district court failed to provide a hearing, the decision to dismiss Mr. Heath's complaint with prejudice must be reversed. Roadway Express, Inc., 447 U.S. at 767; see also Chambers, 501 U.S. at 40 (approving sanctions of attorney's fees for fraud perpetrated on the court because they were imposed only after full briefing and a hearing).

The violation of Mr. Heath's due process rights was not rectified by the opportunity to present a Motion for Reconsideration of the Order of Dismissal. (App. 17). Without affording Mr. Heath a hearing on his motion, the court summarily denied it. (App. 19). However, when a court seeks to permanently deprive a litigant the opportunity to have his or her claim heard on the merits, due process concerns dictate that a hearing must be given prior to the imposition of this sanction. See Roadway Express, Inc., 447 U.S. at 767; Harris, 664 F.2d at 390.

C. Because the in Forma Application Is Vague, Dismissal with Prejudice Was Unfair in Light of Mr. Heath's Good Faith Attempts to Accurately State His Financial Position.

The district court dismissed Mr. Heath's action with prejudice, despite his good faith attempts to comply with the rules governing in forma pauperis applications. (App. 16). Mr. Heath repeatedly explained to the court how he arrived at the figure on his April 25, 1995 affidavit. (App. 3, 4, 6). However, the vaguely-worded questions on the affidavit preclude one from knowing precisely how income should be stated. See discussion infra at p. Thus, to sanction Mr. Heath with a final deprivation of his right to be heard for his inability to comply is an infringement of his due process rights. See Logan, 455 U.S. at 434-35; Rogers, 357 U.S. at 210.

Due process rights are infringed when a litigant is denied access to the court as a penalty, despite a good faith effort to comply with procedural rules. See Logan, 455 U.S. at 434-35; Rogers, 357 U.S. at 210. In Rogers, the Court applied due process scrutiny to a Rule 37 sanction. Rogers, 357 U.S. at 210. The Court was troubled by the unfairness of dismissing an action because of a plaintiff's inability, despite good faith efforts, to comply with the rule. Id. at 210. Reversing the lower court's decision to strike plaintiff's complaint for failure to comply with a discovery order, the Court stated that "there are constitutional limits upon the power of the courts . . . to dismiss an action without affording the party the opportunity for a hearing on the merits of his cause." Id. at 209. In Logan, the Court found that the due process rights of a litigant proceeding under the Illinois Fair Employment Practices Act had been violated when his claim was dismissed due to the Commission's failure to convene a fact finding conference within the 120 days mandated by the Act. Id. at 434-35.

Similarly, the district court's decision to dismiss this case with prejudice is manifestly unfair given the ambiguity of the in forma pauperis application and Mr. Heath's repeated attempts to disclose the basis of his affidavit. (App. 3, 4, 6).

II. SECTION 1915(E)(2) MAY NOT BE APPLIED RETROACTIVELY TO MR. HEATH'S CASE.

The new provision governing dismissals, §1915(e)(2), may not be applied retroactively because it mandates dismissal upon a finding of fraud. The legal consequence of the amendment is to preclude the court from considering lesser sanctions, thus unfairly disturbing a litigants expectations that a court may employ its discretion favorably. In addition, Congress intended the amendment to be applied prospectively only.

A. The Application of §1915 (E)(2) Would Unfairly Impose New Legal Consequences to past Conduct.

Section §1915(2)(e) provides that the court shall dismiss the case at any time if the court determines that--

(A)the allegation of poverty is untrue

(B) the action or appeal--

(I) is frivolous or malicious

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

U.S.C.A. §1915 (e)(2) (West Supp. 1996)(emphasis added).

Prior to this amendment, the statute provided that a court "may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." U.S.C.A. §1915(d) (West 1994) (emphasis added). Thus dismissal is now mandatory rather than discretionary. Mathis v. New York Life Ins. Co, 133 F.3d 546, 547 (7th Cir. 1998); Hutchinson v. Spink, 126 F.3d 895, 899 (7th Cir. 1997). Mr. Heath filed his case on December 30, 1994 (App. 1). Because his action was pending when the Prison Litigation Reform Act ("PLRA") took effect on April 26, 1996, this Court should conclude that §1915(e)(2) is not applicable. Hutchinson, 126 F.3d at 899; Walker v. Taylorville Correctional Ctr., 129 F.3d 410, 412 (7th Cir. 1997).[3]

"The presumption against retroactive legislation is deeply rooted in our jurisprudence." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). The concern embodied in this principle is that the legislature should not be allowed to disturb settled expectations without individualized consideration. Id. at 266. In deciding whether statutory amendments may be applied to pending cases, a court must first determine whether Congress has expressly stated that the statute may have retroactive effect. Landgraf, 511 U.S.

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[3] Although the 7th Circuit in its most recent decision appears to have applied the PLRA to a case brought before the Act's effective date, it did so without addressing retroactivity concerns. Mathis, 133 F.3d at 546.

at 264. Section 1915 (e)(2) evinces no clear intent of retroactive application.

Therefore, this court must determine whether application of the amendment would have an impermissible retroactive effect, i.e., whether it attaches new legal consequences to events completed before its enactment. Id. at 269-70. In Landgraf, the court held that §102 of the 1991 Civil Rights Act, creating a right to recover compensatory and punitive damages for intentional employment discrimination could not be applied retroactively because it imposed a new legal burden to past conduct. Id. at 283.

The amendment to §1915 has precisely the same effect on the substantive rights of in forma pauperis litigants because it imposes a penalty of mandatory dismissal, the legal consequence of which is to preclude the court from considering lesser sanctions. §1915(e)(2). Even if this court were to characterize the change as procedural, §1915(e)(2) is not exempt from a retroactivity analysis. Landgraf, 511 U.S. at 275, n.29. While it is true that a litigant proceeding in forma pauperis faced possible dismissal prior to the amendment, he or she enjoyed at least the possibility that a court would exercise its discretion in favor of lesser sanctions, or even no sanction. Section 1915(e)(2) unfairly upsets this expectation by imposing one sanction--mandatory dismissal.

The 7th Circuit's position with respect to whether §1915(e)(2) may be applied retroactively is in accord with Landgraf. In Hutchinson and Walker, the court properly concluded that the more liberal pre-amendment legal standard by which a case would be scrutinized for

frivolousness would apply to pending cases, rather than the Federal Rule of Civil Procedure 12(b)(6) standard set out in the amendment. Walker, 129 F.3d at 412; Hutchinson, 126 F.3d at 899.

B. Congress Intended the Amendment to be Applied Prospectively Only.

When the drafters of the Prison Litigation Reform Act intended for a particular provision of the legislation to be applied retroactively, they stated as much explicitly. Section 802 of the PLRA (codified as 18 U.S.C. 3626), dealing with prison conditions remedies, expressly provides that it shall be applied retroactively, whereas the remaining sections are silent in this respect. 18 U.S.C. 3626 (West Supp. 1996). By implication, therefore, the other provisions should have no retroactive application. See Lindh v. Murphy, 117 S.Ct. 2059, 2063 (1997) (holding that §107c of the Antiterrorism and Effective Death Penalty Act, expressly applying chapter 154 retroactively, indicated implicitly that amendments to chapter 153 could not be applied retroactively). The 8th Circuit concluded as much with respect to the §803 of the PLRA, amending the Civil Rights Of Institutionalized Persons Act (42 U.S.C. 1997), stating that "[t]he exclusion of 803 and its fee provisions from that clear statement of retroactivity is inconsistent with defendant's argument for retroactivity." Jensen v. Clarke, 94 F.3d 1191, 1203 (8th Cir. 1996). But the Fourth Circuit disagreed. In Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997) the court declined to draw any negative inferences from the express inclusion of a provision making § 802 applicable to pending cases and the absence of the same from §803, citing Landgraf, 511 U.S. at

259-61. Significantly, this conclusion was adopted by only one of the three judges in the decision. Alexander S., 113 F.3d at 1392-96 (Motz, J. concurring and Murnaghan, J., dissenting). Moreover, the 7th Circuit agrees with Jensen that to give §803 retroactive effect would attach new legal consequences to completed conduct. Cooper v. Casey, 97 F.3d 914, 921 (7th Cir. 1996).

The Supreme Court in Landgraf refused to infer that because Congress provided specifically for prospectivity in two provisions it intended the opposite for the remainder of the Civil Rights Act of 1991. Id. at 258-59. However, the Court's conclusion was grounded in the presumption that new legislation is to be applied prospectively absent a clear congressional intent to the contrary. Id. at 272. Indeed, this presumption supports the inference that by making only one provision of the PLRA retroactive, Congress intended the others to be applied prospective only. See Lindh, 117 S.Ct. at 2063.

III. SECTION 1915(E)(2) VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT TREATS IN FORMA PAUPERIS LITIGANTS DIFFERENTLY THAN LITIGANTS NOT PROCEEDING UNDER THE STATUTE WITHOUT ANY RATIONAL BASIS.

In the event this court concludes that §1915(e)(2) has no impermissible retroactive effect, the amendment should nonetheless be struck down as violative of the Fifth Amendment Equal Protection Clause. U.S. Const. amend. V.

A classification which subjects litigants to disparate treatment for alleged misconduct based on their respective financial status is arbitrary and thereby violative of the Equal Protection Clause. Cf. Logan, 455 U.S. at 442-443. Section 1915(e)(2) of the PLRA suffers from this infirmity.

Litigants proceeding in forma pauperis face mandatory dismissal if the court finds that their allegation of poverty is untrue. § 1915(e)(2). Litigants who, because they have sufficient financial resources, do not proceed under the in forma pauperis statute face possible sanctions under Federal Rule of Civil Procedure 11 for filing false statements with the court. Fed. R. Civ. Proc. 11(c). However, under Rule 11, a court has discretion whether to impose sanctions for such misconduct. Id. Thus, persons otherwise similarly situated with respect to allegations of misconduct are treated differently based on financial status, regardless of the merits of the claim. Litigants who do not proceed under the statute enjoy at least the possibility that a court will exercise its discretion in their favor. Fed. R. Civ. Proc. 11(c). Poor litigants have no such chance. §1915(e)(2). There can no rational basis for this distinction.

In order to withstand equal protection scrutiny, legislation which creates a nonsuspect classificatory scheme "must rationally advanc[e] a reasonable and identifiable government objective." Logan, 455 U.S. at 439 (Blackmun, J. concurring) (quoting Schweiker v. Wilson, 450 U.S. 221, 235 (1981)). In Logan, a discharged employee brought a claim alleging employment discrimination under the Illinois Fair Employment Practices Act. Id. at 422 The Illinois Supreme Court barred his claim, however, because the

Commission had failed to convene a fact finding conference with the 120 days mandated by the Act. Id. The Supreme Court reversed on the grounds that the employee's due process rights had been violated. Id. at 434-35. Six Justices in two concurring opinions, however, found additionally that the classification created by the Illinois Supreme Court's decision--between litigants whose claims are processed within 120 days and those whose claims the Commission failed to process with that time--failed equal protection scrutiny because it drew an arbitrary line between otherwise identical claims. Id. at 440, 444. Section 1915(e)(2) likewise creates an arbitrary classification without any rational basis.

The legislature's objective in passing the PLRA was to curb frivolous prisoner lawsuits. 141 Cong. Rec. S7524 (May 25, 1995) (Senator Dole introducing the PLRA in response to the growth in the number of lawsuits filed by prisoners). Based on this rationale, the Fifth Circuit upheld in the face of an equal protection challenge a provision of the PLRA which prohibits a prisoner from proceeding in forma pauperis if he has had more than three actions or appeals dismissed for frivolousness. Carson v. Johnson, 112 F.3d 818, 822 (5th Cir. 1997). Similarly, other circuits have upheld on this basis the provision of the PLRA which requires prisoners to prepay filing fees, but not other litigants proceeding under § 1915. See e.g., Mitchell v. Farcass, 112 F.3d 1483, 1488-89 (11th Cir. 1997). The Seventh Circuit applied this reasoning in upholding the provision of the PLRA which precludes recovery for custodial mental or emotional damages without a prior showing of physical injury. Zehner v. Trigg, 133 F.3d 459, 463 (7th Cir. 1997).

However, such rationale cannot justify the distinction §1915(e)(2) implicitly draws between poor and non-poor litigants. The disparate treatment of prisoners was justified because they have "abused the judicial system in a manner that *non-prisoners* simply have not." Carson, 112 F.3d at 822 (emphasis added); see also Roller v. Gunn, 107 F.3d 227, 234 (4th Cir. 1997) (noting that prisoners have more free time than do other litigants to file suits).[4]

However, there has been no claim that poor litigants abuse the judicial process more so than do wealthier litigants. Nor can one argue that litigants subject to Rule 11 sanctions are any less likely to make untrue statements to courts than are less wealthy litigants proceeding under §1915.

Thus the legislation is both over inclusive in that it regulates non-prisoners, and under inclusive because it fails to apply the same discipline to litigants who do not proceed in forma pauperis. Such irrationality cannot withstand equal protection scrutiny. Logan, 455 U.S. at 439.

III. THE DISTRICT COURT'S DECISION TO DISMISS MR. HEATH'S COMPLAINT WITH PREJUDICE FOR FILING A FALSE AFFIDAVIT OF POVERTY WAS AN ABUSE OF DISCRETION.

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[4] Mr. Heath is not a prisoner, nor does he have a history of abusing the judicial process. The two other lawsuits he filed were not found to be frivolous. (Heath v. Zoll, Case No. 94-C-7803, App. 20; Heath v. Valleylab, Case No. 94-C-7815, App. 20).

The Supreme Court's decision in Denton v. Hernandez, 504 U.S. 25, 34 (1992) precludes a court from dismissing a complaint with prejudice under § 1915 for filing a false affidavit of poverty. However, even a dismissal without prejudice would be an abuse of discretion as applied to Mr. Heath's case because the district court's finding of fraud was erroneous.

A. The Supreme Court's Decision in Denton v. Hernandez Makes Clear That a Dismissal Under §1915 For Filing a False Allegation of Poverty Does Not Preclude a Litigant From Filing a Paid Complaint Making the Same Claims.

Section 1915 fails to specify whether dismissal for filing a false affidavit of poverty may be with prejudice. § 1915(d) (West 1994); § 1915(e)(2) (West 1996).

In Denton, however, the Supreme Court held that "[b]ecause a § 1915(d) dismissal is not a dismissal on the merits, but rather an exercise of the court's discretion under the in forma pauperis statute, the dismissal does not prejudice the filing of a paid complaint making the same allegations." Denton, 504 U.S. at 34. In reviewing a determination of frivolousness, the Court wrote that a dismissal may have res judicata effect on *frivolousness* determinations for future *in forma pauperis petitions*. Id. (emphasis added). Thus, only determinations of frivolousness may result in dismissal with prejudice. See Id. Because a district court's determination that the allegation of

poverty is untrue is not a decision on the merits, a litigant may not be precluded from filing a paid complaint. See Id.

The 7th Circuit's opinion in Mathis is merely dicta and therefore does not contradict Denton. Mathis, 133 F.3d 547. Although the court affirmed the lower court's decision to dismiss with prejudice under §1915, it presented an alternative holding, namely that the appellant presented no legal argument. Id. In addition, the court stated that Denton provides that dismissal with prejudice on the grounds of *frivolousness* may be possible. Id. at 548 (emphasis added). Thus, Mathis cannot be read to undermine Denton's directive that dismissal with prejudice is not allowed unless the court had addressed the merits. Denton, 504 U.S. at 34.

B. The District Court Abused its Discretion by Imposing the Sanction of Dismissal.

In reviewing a §1915 dismissal for abuse of discretion, the Supreme Court has suggested several factors for a court of appeals to consider: whether the plaintiff was proceeding pro se, whether the court applied erroneous legal conclusions, whether the court inappropriately resolved genuine issues of disputed fact, and whether dismissal was with or without prejudice. Denton, 504 U.S. at 34. Although the Court was addressing a dismissal for frivolousness in Denton[5], the interest served by the analysis

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[5] Amicus does not concede that dismissal with prejudice is permissible for filing a false affidavit of poverty. See discussion supra at p. 22-23.

applies equally to dismissals for a false affidavit of poverty--namely to ensure that the lower court has not prematurely truncated a litigant's opportunity to be heard on the merits. See id.

1. Construing Mr. Heath's Pro Se Pleadings Liberally, this Court Should Conclude That the District Court's Finding of Fraud Was Erroneous.

First, because Mr. Heath was pro se at the time he filed his in forma pauperis petitions (App. 2, 3), his pleadings should be construed liberally. Id. (citing Haines v. Kerner, 404 U.S. 519 (1972). In light of Mr. Heath's good faith attempt to most accurately represent his financial status, the district court's finding of fraud cannot stand. (App. 3, 4, 6).

The court wrongly concluded that Mr. Heath intended to deceive the court by reporting his income on the affidavit of poverty as "net of tax," when he had actually subtracted personal expenses as well. (App. 16). While Mr. Heath mistakenly labeled his income as "net of tax," he was forthright in providing the court documents which showed that the $2016.17 took into account personal expenditures. (App 4, Statement of Net Worth). Indeed, Mr. Heath disclosed the basis of the figure reported on his April 25, 1995 affidavit to the court on two occasions prior to the in camera proceeding. (Id.; App. 6, Affidavit of Mr. Enterline).

Moreover, Mr. Heath should not be penalized with such a drastic sanction given that the affidavit gives no clear

guidelines on how to report income. Question 1 requests applicants to "state the amount of your salary or wages per month . . . (list both gross and net salary)." (App. 3). However, nowhere are the terms "gross" and net salary" defined. A Survey of various legislation reveals that definitions of income are by no means uniform. See e.g., 26 U.S.C. §§ 61, 62, 63 (West Supp. 1997)(Internal Revenue Code defining gross, adjusted gross and taxable income respectively); 42 U.S.C. §602 (setting out income eligibility standards under the Aid to Families with Dependent Children Act); 750 ILCS §5/505(a)(2) (West 1997) (Illinois Marriage and Dissolution of Marriage Act defining net income); The language of §1915 stating that a court may dismiss "if the allegation of poverty is untrue" suggests that an assessment of the litigants overall financial position is needed. See §1915(d). Likewise, the affidavit itself requires the applicant to swear that, because of his poverty, he is unable to pay the costs of the proceeding and give security therefor, implying that the court is seeking to determine the funds a litigant has available to devote toward filing fees and legal expenses. (App. 3).

Absent a definition of "gross and net salary," Mr. Heath was not unreasonable in deducting all of the expenses which reduced the amount he had available to pay an attorney. (App. 4, Statement of Changes in Net Worth). Because of business and personal expenses and a federal tax lien, he was left with only a small amount of money with which to pay legal expenses. (Id.). Even if the district court disagreed with Mr. Heath's interpretation, however, it was an abuse of discretion to impose the most severe sanction for his mistake. (App. 16).

2. The District Court Applied Erroneous Legal Conclusions in Evaluating Mr. Heath's in Forma Pauperis Application.

The second factor under Denton asks whether the district court applied erroneous legal conclusions. Denton, 504 U.S. at 34 Here, the district court's finding of fraud was based on an erroneous interpretation of the in forma pauperis application. (App. 16). First, the court wrongly concluded that Mr. Heath was required to report his gross income for the calendar year 1994. (Id.). The court also unfairly considered Mr. Heath's income from the previous two years. (Id.). While Question 1 on the application does not specify a reporting period, Question 2 specifically asks for the amounts from self-employment from the preceding twelve months. (App. 3). Because Mr. Heath's income was derived almost entirely from self-employment, the relevant reporting period was the twelve months preceding his application--April 1, 1994 to March 31, 1995. (Id., Affidavit of Mr. Enterline). Moreover, the application does not preclude an applicant from amending his affidavit to reflect changes in financial status.

3. The District Court Improperly Resolved Genuine Issues of Disputed Fact.

Applying the third factor, this court should find that the district court inappropriately resolved genuine issues of disputed fact. Denton, 504 U.S. at 34. During the in camera proceeding, Mr. Heath sought to raise a dispute regarding the allegations of fraud. (App. 21, pp. 13-15). However he was

prevented from doing so because the district court denied him the opportunity to present evidence, explain the basis of his affidavit, or rebut Mr. Miller's allegations. (See due process discussion supra at pp. 7-13). As a result, the district court prematurely resolved genuine issues of disputed fact. (App. 21, p. 15).

A consequence of this inadequate procedure was the district court's faulty conclusion that the figure reported on Mr. Heath's affidavit represented his average income for the past six years. (App. 16). Mr. Heath amended his affidavit on April 25, 1995 in response to a change in his net worth at that time due to a drop in income and a tax lien for which he became liable in March 1995. (App. 3, Affidavit of Mr. Enterline; App. 4, Statement of Changes in Net Worth; App. 17, Notice of Federal Tax Lien, Support Schedule, Affidavit of Ms. Smith). In addition, he took into account personal expenditures in arriving at the figure $2016.17. (App. 4, Statement of Changes in Net Worth) Contrary to the district court's conclusion, however, this figure did not represent Mr. Heath's average income over the past six years (App. 16), but was based on his realized change in net worth for the period of April 1, 1994 to March 31, 1995. (App. 4, Statement of Changes in Net Worth). These errors support a finding that the district court abused its discretion in dismissing Mr. Heath's case. Denton, 504 U.S. at 34.

4. The District Court's decision to Dismiss With Prejudice was Improper without Considering Lesser Sanctions.

The final factor this court should consider in reviewing the district court's order is that dismissal was imposed with prejudice. Denton, 504 U.S. 34. While the district court has the discretion to dismiss a claim under the in forma pauperis statute, it may not prevent the litigant from filing a paid complaint. See Id. Thus, the court's order barring Mr. Heath from litigating his claim altogether must be reversed as an abuse of discretion. Id.

However, even if dismissal with prejudice were not precluded by Denton, because it is a harsh, disfavored remedy, the district court should have considered lesser sanctions. See Lay v. Justices-Middle District Court, 811 F.2d 285 (5th Cir. 1987)(requiring district court to instruct plaintiff to pay filing fees before imposing dismissal with prejudice for filing false affidavit of poverty); Camp v. Oliver, 798 F.2d 434, 438 (11th Cir. 1986) (same); Christensen v. Bristol-Meyers Co., 1990 WL 6554, p. 2-3 (requiring plaintiff to pay filing costs or risk dismissal, and to pay her pro bono attorneys for services rendered).

In other contexts, the 7th Circuit has called dismissal with prejudice a "draconian" sanction which "must be infrequently resorted to by district courts." Barnhill v. United States, 11 F.3d 1360, 1367 (7th Cir. 1993). In Barnhill, the court reversed a dismissal with prejudice for attorney misconduct, noting that this sanction should be imposed only in extreme cases or when other less drastic sanctions have proven unavailing. Id. (internal citations omitted). This court further stated that dismissal should not be invoked without first considering what effect, if any, the challenged conduct has had on the litigation. Id. at 1368.

There is no reason why a more stringent rule regarding dismissals with prejudice should apply to petitions for in forma pauperis. In the instant case, the alleged financial misstatements had no effect on the litigation. Although the court appointed several attorneys, with the exception of Mr. Friedman, all were dismissed for conflict of interest and none of them filed a substantive pleading on behalf of Mr. Heath. (App. 8, 9, 10, 11, 12, 13, 15). Because defendant-appellees suffered no prejudice as a result of Mr. Heath's affidavit, dismissal with prejudice was too harsh a sanction. See Choi v. Chem. Bank, 939 F.Supp. 304, 309 (S.D.N.Y. 1996) (declining to dismiss despite finding of intentional filing of a false affidavit of poverty since the defendant was not prejudiced by the financial misrepresentations); Witherspoon v. Roadway Express, 782 F.Supp. 567, 570 (D. Kan. 1992) (holding that although plaintiff's answers on application were outrageous and patently false, he obtained no advantage in the case other than not having to pay required court costs for bringing the action).

CONCLUSION

For the reasons stated above, Amicus Curiae respectfully requests this court to reverse the district court's order dismissing Mr. Heath's complaint with prejudice.

Respectfully submitted,

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COPY OF AMICUS CURIAE REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

ROGER L. HEATH,
Plaintiff-Appellant,

Appeal from the United States District Court No. 97-1844
for the Northern District of Illinois, Eastern Division.
No. 94 C 7812
The Honorable George W. Lindberg, Judge.

v.

GOMER W. WALTERS, VERNON R. LOUKES, JR., NADEEN BERGER, et al. , *Defendant-Appellees.*

REPLY BRIEF OF AMICUS CURIAE

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1. ARGUMENT
THE DISTRICT COURT IMPROPERLY IMPOSED SANCTIONS WITHOUT AFFORDING MR. HEATH ADEQUATE NOTICE OR AN EVIDENTIARY HEARING.

It is unfair to award the defendants in this case a windfall by dismissing Mr. Heath's case without requiring them to answer his charges. Defendants, who did not even raise the in forma pauperis issue themselves, should not be able to reap the benefits of a judicial determination made in violation of Mr. Heath's rights. Defendants have failed to show why litigants proceeding in forma pauperis, such as Mr. Heath, are entitled to less procedural safeguards than nonindigent litigants. In this case, the notice Mr. Heath did not receive any notice that sanctions were to be considered at the in camera proceedings. All notice Mr. Heath received was the motion that his court appointed attorney was presenting a motion to withdraw as attorney because of a conflict of interest with another attorney's client. The record reveals no notice prior to the court's revocation of in forma pauperis status. Likewise, Mr. Heath received no notice prior to the court's sua sponte sanction of dismissal with prejudice. He was not even allowed to file a brief or submit evidence. Defendants do not dispute these facts. Because Mr. Heath was unaware of the court's intention, he had no opportunity to defend himself prior to being sanctioned. Further, the in camera hearing does not constitute a meaningful opportunity to be heard, as it allowed Mr. Heath no reasonable time to prepare a defense. Appellee argue that the IFP statute gives enough notice. This argument is silly,

even alleged murderers get a notice and hearing before they are found guilty and sentenced even though Illinois statutes clearly prohibits murder. For the reasons set forth below, this "process" was inadequate.

United States Supreme Court Cases Require That In Forma Pauperis Litigants Be Given Procedural Safeguards Similar And Equal To Those Afforded Nonindigent Litigants

The Supreme Court has stated that litigants proceeding in forma pauperis must be afforded equal treatment with nonindigent litigants. Neitzke v. Williams, 490 U.S. 319, 329-30 (1989) (stating that the goal of §1915 is "to assure the equality of consideration for all litigants") (quoting Coppedge v. United States, 369 U.S. 438, 447 (1962)). Consistent with this principle, litigants should not be denied due process protections simply because they are proceeding in forma pauperis. See Neitzke, 490 U.S. at 330. Indeed, because the "process" employed by the district court was not equivalent with that afforded similarly-situated richer litigants not proceeding under the in forma pauperis, it violated Mr. Heath's rights.

The Supreme Court in Nietzke rejected an interpretation of §1915(d) that would have afforded disparate procedural protections to indigent plaintiffs. 490 U.S. at 330. In holding that a complaint is not necessarily frivolous so as to warrant sua sponte dismissal because it fails to state a claim, the Court said, "[t]o conflate the standards . . . would thus deny indigent plaintiffs the practical protections against unwarranted dismissal generally accorded paying plaintiffs under the Federal Rules. . . Given Congress' goal

of putting indigent plaintiffs on similar footing with paying plaintiffs, [such an] interpretation cannot reasonably be sustained."[6] Id. Thus, the Court's analysis limits a court's ability to dispose of in forma pauperis litigation without adequate procedural protections commensurate with those afforded paying plaintiffs. Id.

In order to withstand equal protection scrutiny, legislation which creates a non-suspect classificatory scheme "must rationally advanc[e] a reasonable and identifiable government objective." Logan v. Zimmerman Brush Co., (1982) 422 U.S. at 439 (Blackmun, J. concurring) (quoting Schweiker v. Wilson, 450 U.S. 221, 235 (1981)). Defendants have failed to provide a rationale that justifies affording indigents less process than nonindigent litigants sanctioned under Rule 11. Both poor and non-poor litigants face the sanction of dismissal for committing a fraud on the court. Fed. R. Civ. P. 11(c); §1915(d). However, non-indigent are afforded a hearing and an opportunity to respond before a determination of fraud is ever made. Fed. R. Civ. P. 11(c). This disparate treatment in procedure is unwarranted. See Nietzke 490 U.S. at 329-30.

Defendants Baxter, Walters, Townser, et al. ("defendant Baxter") rely on Harris v. Cuyler to argue that disparate treatment is justified. (Def. Baxter Resp. at 12). In

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[6]Amicus Curiae recognizes that the amended statute now provides for 12(b)(6) dismissals. §1915(e)(2). However, given the concerns articulated by the Court in Nietzke, the procedural protections accompanying such a dismissal would be merited. Id.

the quote cited by defendants, the court states, "[t]he fact that Congress expressly provided for dismissal for frivolous claims, notwithstanding the already extant Fed. R. Civ. P. 12(b)(6) which covers similar ground, reinforces our view that Congress sought in section 1915(d) to accommodate two interests. On one hand, it sought to achieve the laudable goal of making the judicial process available for those without means; on the other hand, it sought to minimize the burden on the courts by those litigants who misuse the opportunity afforded." Harris, 664 F.2d at 389-90.

Although, the court concludes by saying dismissal with prejudice is permitted, these statements in no way imply that indigents are entitled to less procedural protection when facing a dismissal for filing a false affidavit of poverty. Id.

Further, the potential problem of fraudulent invocation of the statute's benefits[7] does not justify eschewing due process rights. Rule 11 and §1915(d) share the purpose of deterring fraud on the court. Under both provisions court must make particular findings before imposing sanctions. Courts have not found that employing procedural safeguards in making such findings impedes the objective of Rule 11. Likewise, there is no reason to think that doing so would undermine the deterrence of fraud under §1915(d).

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[7] A determination of poverty does not guarantee the appointment of counsel. N.D. IL Rule 3.82(C).

Certainly the efficient disposition of fraudulent claims is a legitimate goal. However, denying a claimant adequate notice and an opportunity to respond before such a determination is even made is an illegitimate means of doing so. See Roadway Express, Inc., 447 U.S. at 767; Nietzke, 490 U.S. at 390. In order for §1915 to provide poor litigants truly equal access to courts, the statute must be construed to provide them the same procedural protections afforded nonindigent litigants. See Neitzke, 490 U.S. at 329-30.

Appellees Violate The Approach Used By the U.S. Supreme Court in Matthews v. Eldridge To Determine What Procedures Are Required.

Applying the Matthews v. Eldridge balancing test, this court should conclude that further process is due Mr. Heath when the court decides to revoke IFP status and to dismiss with prejudice totally court may impose sanctions under §1915. 424 U.S. 319, 335 (1976). First, the severity of the sanction the court imposed is great– denial of IFP status, refusal to appoint counsel in a patent case, dismissal of a litigants cause of action. §1915(d). In Mr. Heath's case, the district court imposed the most extreme sanctions including, dismissal with prejudice so he can not even refile if he can borrow the filing fees and get an attorney to take his case on a motion set fee notice provide and a hearing for attorneys fee sanctions but for dismissals for filing an continue IFP motion. (App. 16)[8]. In light of the Supreme Court's position that all sanctions merit the protection of

[8] Cites to the record shall be to the appendix of opening Brief of Amicus Curiae.

notice and an opportunity for a hearing, these sanctions of which will foreclose Mr. Heath's claims and dismissal with prejudice necessarily merit these safeguards. See Roadway Express, Inc., 447 U.S. 752, 767 (1980). Defendant Baxter Lab's claim otherwise. There, the Court stated, "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Id. (emphasis added). Nonetheless, Defendant Baxter totally misreads Raodway Express to make a ludicrous argument Adkins v. E.I. Dupont De Nemours & Co. Inc., 335 U.S. 331 (1948) to make the untenable claim that litigants should receive notice and opportunity to present a defense when the sanction of fees and costs is imposed, but not when facing the permanent deprivation of her cause of action. (Baxter Resp. at 13). However, given that "[t]he due process concerns posed by outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers," defendant Baxter's assertion must be rejected out of hand. Indeed Roadway requires refusal and re Roadway Express, Inc., 447 U.S. at 767, n.14. The second and third Mathews factors also weigh in favor of a hearing. 424 U.S. at 335. The risk of an erroneous dismissal without a hearing is great. Because the affidavit required to proceed in forma pauperis gives no clear guidelines on how to report income, litigants may need the opportunity to explain how they derived the figure reported, or how they interpreted what information the form is requesting. (A.C. Brief at 25). Further, a hearing is invaluable in assessing the credibility of litigants, such that a court may properly exercise its discretion whether to dismiss. See Harris, 664 F.2d at 390. In Mr. Heath's case in particular, testimony by his accountant, or additional financial records, may have

prevented the district court from misunderstanding the figure represented on his affidavit. (A.C. Brief at 27-28).

Finally, applying the fourth Mathews factor, this court should find that the court's interest in deterring fraudulent conduct does not outweigh the concerns outlined above. 424 U.S. at 335. The courts can accommodate both the concern of curbing abusive litigation and that of providing adequate procedural protections by affording litigants notice of the proposed sanctions and a hearing before imposing sanctions. See Fed. R. Civ. P. 11(c). (A.C. Brief at 10-11).

Further, the district court's determination whether to appoint counsel for Mr. Heath involved the balancing of a five-factor test. See Swofford v. Mandrell, 969 F.2d 547, 551 (7th Cir. 1992). One of the considerations it had to take into account was the complexity of the legal issues presented in Mr. Heath's case. Id. Given that he is alleging patent infringement and antitrust claims, the evaluation of this factor alone merited a hearing before the district court determined Mr. Heath was not entitled to counsel. (App. 1).

Defendant Baxter Lab's mistakenly claims that Mathis v. New York Life Ins. Co., 133 F.3d 546 (7th Cir. 1998) held that no hearing is required. (Baxter Resp. at p. 10), but the issue of whether a hearing is required was not addressed by the court. (What did they rule) Indeed, the Eleventh Circuit, which has addressed the procedural requirements under §1915 has ruled that a hearing is required. Harris, 664 F.2d at 389-390. The Eleventh Circuit Court in Harris directly addressed the hearing requirement,

expressing disapproval that the district court had dismissed the complaint with prejudice without a hearing. (For intrue pleadings) Id. at 389-390. The court found the procedures inadequate, even though plaintiff had submitted a memorandum in opposition to the motion to dismiss. Id. Similarly, Attwood v. Singletary, 105 F.3d 601 (11th Cir. 1997) provides support for a hearing requirement. The court took note of the due process requirements with respect to Rule 11 specifically, and upheld the dismissal under §1915(d) because a two-day hearing revealed that the plaintiff was not indigent. Attwood, 105 F.3d at 613.

These cases demonstrate that the balance of interest weigh favor of providing in forma pauperis litigants notice and a hearing before a court imposes sanctions. Even if this court concludes that a evidentiary hearing may not be merited in every case, it nonetheless must find that it was merited in Mr. Heath's. Because the district failed to afford Mr. Heath these protections before imposing the most extreme sanction, its decision must be reversed.

4. Mr. Heath Was Given No Notice of the Proposed Sanctions.

No one Mr. Heath notice of the sanctions sought at the in camera proceeding. None of the defendants filed motions seeking sanctions before the in camera proceeding. Now Appellees, belatedly seek to perceive their windfall. (A.C. Brief at 7). The assertions of defendants Walters and Baxter do not support a finding to the contrary. Defendant Walters states that Mr. Heath had adequate notice of the proposed sanctions because Mr. Friedman expressed concern

to Mr. Heath about his tax returns and because Mr. Heath obtained a letter from his accountant explaining his finances. (Def. Walters Resp. at 11). However, nowhere in the docket is there any indication that Mr. Miller's motion to withdraw was because of any intrue allegations of poverty, the only issue pending Mr. Miller's motion to withdraw because of a conflict of interest. Indeed, Judge Lindberg bought the issues up sua sponte which Mr. Miller indicated he did not expect the court to reach. Without knowing fully what transpired in the private conversations between Mr. Heath and his attorney, imputing such knowledge to Mr. Heath is unwarranted. Moreover, even if Mr. Heath was aware that his attorneys questioned his affidavit, such "notice" is wholly deficient, as it was not official notice by the court of the proposed sanctions. Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 320 (1950); Fed. R. Civ. P. 11(c).

The defendants do not contest that the district court itself failed to give Mr. Heath prior notice of the sanction before dismissing his attorney. Further, defendants do not dispute that the court failed to inform Mr. Heath of its intention of dismissing his case with prejudice prior to the imposition of that sanction.[9] This simultaneous notice and imposition of sanctions did not comport with due process because it failed to afford Mr. Heath adequate time to prepare a defense. See Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 14 (1978) ("[t]he purpose of notice under the Due Process Clause is to appraise the

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[9]Likewise, no pleading by the defendants preceded either sanction.

affected individual of, and permit adequate preparation for, an impending 'hearing'").

Equally unpersuasive is defendant Baxter's contention that the in forma pauperis statute provided Mr. Heath with adequate notice. (Def. Baxter Resp. at 14-15). First, the Supreme Court has said that due process requires that the notice for the _____ include sufficient information to advise the party of the potential adverse consequences. Memphis Light, 346 U.S. at 14 (requiring that proper notice had to inform utility customers of the possible threat of termination of services for failing to pay a bill). Because §1915(d) warns litigants only of the possibility of dismissal, but does not tell litigants when this issue will be heard warn of the risk of dismissal *with prejudice*, the notice to Mr. Heath was inadequate. 28 U.S.C.A. §1915(d). Second, for the reasons stated above and in Amicus Curiae's opening brief, indigent litigants should be afforded the same notice to which non-indigent are entitled under Rule 11 and Rule 12(b)(6). (A.C. Brief at 11). Although Rule 11 warns litigants that sanctions may be imposed for particular conduct, due process concerns dictate that litigants are entitled to additional notice by the court seeking to impose sanctions. Fed. R. Civ. P. 11(c); see also Johnson v. Waddell & Reed, Inc., 74 F.3d 147, 151 (7th Cir. 1996); Kapco Mfg. Co., Inc. v. C&O Enter., Inc., 886 F.2d 1485, 1494 (7th Cir. 1989). Similarly, sua sponte dismissals for failure to state a claim must be preceded by notice. Shockley v. Jones, 823 F.2d 1068, 1073 (7th Cir. 1987). Because of the extreme nature of the sanctions imposed by the court in the present case, notice in addition to the statute is merited. See Roadway Express, Inc., 447 U.S. at 767.

5. Mr. Heath Was Given No Meaningful Opportunity to Present a Defense Prior to the Dismissal of His Case with Prejudice.

Judge Lindberg twice decided sua sponte, call his accountant to explain the calculations to take action because ____ income and the explain Miller's confusion and innocent int_____. There is no doubt that Mr. Heath desperately wants to have counsel appointed to litigate his patent and antitrust claims. When his IFP motions were rejected, he amended application to show he did not have available income to hire a lawyer No one seriously contends that Mr. Heath can afford a lawyer, Nor can Appellees be serious that Mr. Heath is so sophisticated that he can match wits let alone litigation skills with the money prestigious lawyers lined up against him. And it is most assuredly true that Mr. Heath cannot afford the hourly rate of any of one of their attorneys.

Mr. Heath was entitled to an evidentiary hearing to e_____ the facts, See Roadway Express, Inc., 447 U.S. at 767. Defendant Baxter claims that Mr. Heath's due process rights were met when he filed his affidavits and supporting documents. (Def. Baxter Resp. at 16). Considering that these submissions were made prior to notice of the sanctions, they cannot constitute a meaningful opportunity to respond to the proposal of sanctions. See Memphis Light, 346 U.S. at 14. Further, as Amicus argued in its original brief, the in camera hearing was inadequate since Mr. Heath was forced to respond immediately to the charges of fraud without the opportunity to prepare a defense. Id.; (A.C. Brief at 9-10).

Significantly, defendants do not disagree that the court provided no additional procedures before enhancing the penalty imposed upon Mr. Heath from dismissing his appointed counsel to dismissing his case with prejudice. The district court, through its order vacating the appointment of counsel, indicated that the matter had been adjudicated. (App.15).[10] Because Mr. Heath had no notice of the court's intention to elevate the sanction to dismiss his case with prejudice, the in camera hearing cannot constitute an opportunity to respond to it. See Memphis Light, 436 U.S. at 14.

II.

DISMISSAL OF MR. HEATH'S CASE WITH PREJUDICE IS PRECLUDED BY THE UNANIMOUS UNITED STATES SUPREME COURT DECISION IN DENTON V. HERNANDEZ ISSUED IN 1992.

Despite the Supreme Court's express language to the contrary, defendants assert that dismissal with prejudice under §1915(d) is permitted. The unanimous court stated (Def. Baxter Resp. at 6-9; Def. Walters Resp. at 3-7; Def. 2-4). Amicus Curiae agrees with defendants to the limited extent that the Court in Denton contemplated dismissals with

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[10]Contrary to Defendant Walters claim, the district court's order did not increase the sanction from a dismissal without prejudice to one with prejudice. (Def. Walter Resp. at 10). Rather, the order changed the sanction from denying Mr. Heath leave to proceed in forma pauperis to dismissal with prejudice. (App. 16).

prejudice, but only with respect to dismissals for frivolousness. Denton v. Hernandez, 504 U.S. 25, 34 (1992). In addition, dismissals for maliciousness would not be precluded under Denton because unlike dismissals for filing a false affidavit of poverty, the court must address the merits of the underlying complaint to reach its determination.

The interest underlying the Court's opinion in Denton was to ensure that courts do not dismiss cases prematurely without reaching the merits. Denton, 504 U.S. at 34. Moreover, the Court has placed this concern squarely within the due process doctrine. See Societe Internationale Pour Participations Industrielles Et Commmerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958). Allowing dismissal with prejudice for filing a false affidavit is in direct conflict with this principle. See Denton, 504 U.S. at 32; see also Rogers, 357 U.S. at 209. A court's finding that a litigant is not entitled to proceed in forma pauperis does not preclude him from filing a paid complaint. Id. at 34.

III. THE DISTRICT COURT'S FINDING OF FRAUD WAS ERRONEOUS.

In light of Mr. Heath's good faith attempt to most accurately represent his financial status, the district court's finding of fraud cannot stand. As Amicus stated in its original brief, Mr. Heath's should not be penalized for attempting to most accurately state the income he had available to pay for counsel. (A.C. Brief at). Defendant Walters wrongly claims that Mr. Heath's allegation of poverty was "plainly and simply untrue." (Def. Walters Resp. at 14). However, absent a definition of "gross and net

salary," Mr. Heath was not unreasonable in deducting all of the expenses which reduced the amount he had available to pay an attorney. Because of business and personal expenses and a federal tax lien, he was left with only a small amount of money with which to pay legal expenses. (App. 17).

Indeed, the quote from Mathews v. Gaither relied upon by defendant Baxter, read in its entirety, supports Mr. Heath's reading of the requirements. (Def. Baxter Resp. at 11). In Mathews, the court stated that the purpose of §1915(d) is to "weed out the litigants who falsely understate their net worth in order to obtain in forma pauperis status when they are not entitled to that status based on their true net worth." 902 F.2d 877, 881 (11th Cir. 1990) (emphasis added). However, even if the district court disagreed with Mr. Heath's interpretation of the affidavit requirements, it was an abuse of discretion to impose the most severe sanction for his mistake without providing him an opportunity to present or explain his financial records in a hearing. Cf. Cleveland Bd. of Educ. V. Loudermill, 470 U.S. 532, 544 (1985) (". . . the right to a hearing does not depend on a demonstration of certain success").

It would be unfair to award the defendants in this case a windfall by dismissing Mr. Heath's case without requiring them to answer his charges. Defendants, who did not even raise the in forma pauperis issue themselves, should not be able to reap the benefits of a judicial determination made in violation of Mr. Heath's rights.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests this Court to reverse the district court's order dismissing Mr. Heath's case with prejudice.

Respectfully submitted,

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